

SUPREME COURT OF WISCONSIN**NOTICE**

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 05-01

**In the matter of the Petition for Amendment to
Supreme Court Rules relating to Cost
Assessments in the Lawyer Regulation System**

FILED**MAY 1, 2006**

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

On January 18, 2005, Keith Sellen, Director of the Office of Lawyer Regulation (OLR), filed a petition to amend Supreme Court Rule 22.001 (3) relating to cost assessments in the lawyer regulation system. The State Bar of Wisconsin's Board of Governors (Board) opposed the OLR's petition and offered an alternate approach, developed with the assistance of Director Sellen. The Board proposed an approach by which the referee reviewing the disciplinary proceeding would make recommendations to the court regarding the assessment of costs.

A public hearing on the matter was conducted on November 14, 2005. Several individuals participated. The court took the matter under advisement pending the receipt of further information, including the results of a Bench and Bar Survey conducted by the State Bar of Wisconsin, which included

questions regarding the allocation of fees and costs in lawyer disciplinary proceedings.

At its open administrative conference on March 7, 2006, the majority of the court voted to amend the rules relating to the assessment of costs in lawyer disciplinary proceedings as set forth herein. Therefore,

IT IS ORDERED that the petition to amend SCR 22.001 (3) is denied;

IT IS FURTHER ORDERED that a modified version of the proposal advanced by the Board is adopted effective July 1, 2006, whereby the supreme court will exercise discretion with respect to the assessment of costs using criteria proposed by the Board as set forth herein;

Section 1. 22.24 (1m) is created to read:

22.24 (1m) The court's general policy is that upon a finding of misconduct it is appropriate to impose all costs, including the expenses of counsel for the office of lawyer regulation, upon the respondent. In cases involving extraordinary circumstances the court may, in the exercise of its discretion, reduce the amount of costs imposed upon a respondent. In exercising its discretion regarding the assessment of costs, the court will consider the submissions of the parties and all of the following factors:

- (a) The number of counts charged, contested, and proven.
- (b) The nature of the misconduct.
- (c) The level of discipline sought by the parties and recommended by the referee.

(d) The respondent's cooperation with the disciplinary process.

(e) Prior discipline, if any.

(f) Other relevant circumstances.

Section 2. SCR 22.24 (2) is amended as follows:

22.24 (2) In seeking the assessment of costs by the supreme court, the director shall file in the court a statement of costs within 20 days after the filing of the referee's report, or a SCR 22.12 or 22.34(10) stipulation, together with a recommendation to the court regarding the costs to be assessed against the respondent. ~~provided that if~~ If an appeal of the referee's report is filed or the supreme court orders briefs to be filed in response to the referee's report, ~~then~~ a supplemental statement of costs and recommendation regarding the assessment of costs shall be filed within 14 days after the appeal is assigned for submission to the court or the briefs ordered by the court are filed. The recommendation should explain why the particular amount of costs is being sought. ~~Objection to the~~ statement of costs [which may include relevant supporting documentation] shall be filed by motion within ~~10~~21 days after service of the statement of costs. ~~The director has the burden of establishing costs to be assessed.~~ A respondent who objects to a statement of costs must explain, with specificity, the reasons for the objection and must state what he or she considers to be a reasonable amount of costs. The office of lawyer regulation may reply within 11 days of receiving the objection.

IT IS FURTHER ORDERED that this order shall apply prospectively to disciplinary proceedings, medical incapacity proceedings, or reinstatement proceedings filed on or after July 1, 2006;

IT IS FURTHER ORDERED that unless this order is amended, these amendments to Supreme Court Rule 22.24 shall expire on December 31, 2008;

IT IS FURTHER ORDERED that notice of this amendment to the supreme court rules be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 1st day of May, 2006.

BY THE COURT:

Cornelia G. Clark
Clerk of Supreme Court

¶1 DAVID T. PROSSER, J. (*dissenting*). For many years Supreme Court rules have authorized the assessment of costs against attorneys in disciplinary proceedings. See In re Disciplinary Proceedings Against Konnor, 2005 WI 37, ¶45 n.5, 279 Wis. 2d 284, 694 N.W.2d 376 (Abrahamson, C.J., concurring). The court's authority is presently embodied in SCR 22.24(1), which provides that the court "may assess against the respondent [attorney] all or a portion of the costs of a disciplinary proceeding in which misconduct is found."

¶2 The court's practice in recent years has been to impose all costs against the respondent if any misconduct is found. As a general rule, the court has been unwilling to exercise its discretion to apportion costs, even when the respondent prevails in disputes about some charges, the level of discipline to be imposed, or some contested procedural matter. See Konnor, ¶¶93-114 (Prosser, J., concurring in part, dissenting in part).

¶3 The court's unwillingness to apportion costs in these circumstances has generated controversy. The creation of SCR 22.24(1m) and the amendment to SCR 22.24(2) are the court's half-hearted response to this controversy. These changes give the court specific factors to consider when it receives a request for apportionment of costs, but their application is limited to "extraordinary circumstances."

¶4 I dissent from the changes for two reasons. First, I believe that recommendations for apportionment should be made by our referees. In short, I support the plan proposed by the

State Bar of Wisconsin. Second, the introduction of "extraordinary circumstances" into the rule amounts to nothing less than the rationing of fairness.

¶5 I hope I am wrong and the experience under the new rules will produce a transparent, fair attorney discipline system. Time will tell.

¶6 I am authorized to state that Justices PATIENCE DRAKE ROGGENSACK and LOUIS B. BUTLER join this dissent.

¶7 LOUIS B. BUTLER, JR., J. (*dissenting*). The court now formally adopts a general policy that upon a finding of misconduct, it is appropriate to impose all costs, including the expenses of counsel for the Office of Lawyer Regulation (OLR), upon the respondent. SCR 22.24(1m). This policy merely implements what has been the past practice of this court. See, e.g., In re Disciplinary Proceedings Against Pangman, 216 Wis. 2d 440, 460, 574 N.W.2d 232 (1998). See also, In re Disciplinary Proceedings Against Kalal, 2002 WI 45, ¶33, 252 Wis. 2d 261, 278, 643 N.W.2d 466; and In re Disciplinary Proceedings Against Johnson, 165 Wis. 2d 14, 20, 477 N.W.2d 54 (1991). While the court may, in its discretion, reduce the amount of costs imposed upon the respondent when "extraordinary circumstances" are present, and indeed has set forth criteria to be considered in that regard,¹ I fear that this rule goes too far in memorializing a policy that unnecessarily limits our discretion to fairly and justly decide the matter before us. I therefore respectfully dissent from the implementation of this rule.

¶8 To me, it is perfectly reasonable, and indeed appropriate, to assess full costs against an attorney who has committed the misconduct that led to the imposition of those costs. When one does wrong, one should be held accountable.

¶9 On the other hand, it is fundamentally unfair to assess the costs of the proceedings against one who has done no wrong. We certainly would not hold a criminal defendant

¹ SCR 22.24(1m).

accountable for offenses he or she did not commit. Nor should we expect an attorney, who has every right to clear his or her name, to be responsible for a prosecution that yields no fruit. Our system of justice presumes innocence until guilt is proven. We should adhere to that principle when imposing attorney discipline.

¶10 As is often the case, the devil is in the details. Attorneys frequently face multiple violations in an OLR proceeding. Many times, all counts are established, so that no issue is presented as to how costs should be apportioned. At times, an attorney is cleared of all counts, leaving no issue regarding costs the court should impose. The problem arises where the OLR proves some, but not all, of the charges facing an attorney. The question becomes one of how costs should be apportioned.

¶11 This court has adhered to the general practice that it rejects objections to full assessments of costs based on an apportionment of the number of misconduct allegations established. I do not entirely disagree with that practice. I have previously stated that when one has committed rules violations that are substantially related to unproven allegations, it is the attorney's misconduct that forces the need for further investigation. Thus, the attorney should be responsible for all costs associated with the investigation, whether proven or not. See In re Disciplinary Proceedings Against Polich, 2005 WI 36, 279 Wis. 2d 266, 694 N.W.2d 367 (Butler, J. concurring in part, dissenting in part), and In re

Disciplinary Proceedings Against Backes, 2005 WI 59, 281 Wis. 2d 1, 697 N.W.2d 49 (Butler, J. concurring in part, dissenting in part).

¶12 I strongly disagree that an attorney should be held accountable and responsible for full costs when the attorney is absolved of any misconduct that is wholly unrelated to other misconduct that was found. For example, if an attorney is charged with 15 counts of misconduct relating to five clients, three counts per client, but OLR proves only one count relating to one client, it is now court policy under the new rule that the attorney pay full costs for all 15 counts. While I recognize and appreciate the fact that the rule now has established criteria for the exercise of our discretion regarding the assessment of costs, our exercise of discretion is limited to cases involving "extraordinary circumstances." SCR 22.24(1m). This policy is backwards, and presumes fault instead of innocence.

¶13 I fully understand why this court does not want to pass the costs of OLR proceedings on to the full bar. In most cases, I agree with that sentiment. Attorneys who have done no wrong should not have to pay for those who commit misconduct. Yet, some attorneys who appear before us in disciplinary proceedings have similarly done no wrong with respect to some of their clients, and that same sentiment should apply to them.² A

² When this occurs, it makes more sense to spread the costs of the OLR prosecutions among the approximately 22,000 members of the state bar, resulting in a miniscule increase in the assessment for each attorney, than to impose literally thousands of dollars upon a single attorney.

policy that would seem to make more sense, assuming a policy is needed at all, is one that would impose full costs for all charges established, with this court having the discretion to charge additional costs for charges that were not established but that were substantially related to misconduct that was proven. Requiring attorneys to pay for the costs of all of the proceedings, when their conduct does not violate any rule or relate to misconduct that has been established, is simply wrong.

¶14 For the foregoing reasons, I respectfully dissent. I am authorized to state that Justice DAVID T. PROSSER and Justice PATIENCE DRAKE ROGGENSACK join this opinion.

